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No. 84-979

In the Supreme Court of the United States

OCTOBER TERM, 1984

REBECCA MAE CROSS, PETITIONER

v.

UNITED STATES POSTAL SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

REX E. LEE
Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

WILLIAM KANTER
CARLENE V. MCINTYRE
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether prejudgment interest may be awarded against the Postal Service in an action brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16.

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OPINIONS BELOW

The panel opinion of the court of appeals (Pet. App. A5-A17) and the order of the en banc court of appeals affirming the judgment of the district court by an equally divided vote (Pet. App. A3-A4) are reported at 733 F.2d 1327. The district court's opinion (Pet. App. A20-A33) and order denying reconsideration (Pet. App. A18-A19) are unreported. A previous opinion of the court of appeals is reported at 639 F.2d 409. A previous opinion of the district court is reported at 483 F. Supp. 1050.

JURISDICTION

The judgment of the en banc court of appeals was entered on September 20, 1984. The petition for a writ of certiorari was filed on December 18, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner brought suit against the Postal Service under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16, claiming that the Postal Service refused to hire her because of her race. The United States District Court for the District of Missouri entered judgment for the Postal Service, but the court of appeals reversed and ordered that judgment be entered in favor of petitioner. 639 F.2d 409 (1981), rev'g 483 F. Supp. 1050 (1979).

On remand, the district court ordered that petitioner be appointed to the position for which she had applied as soon as a vacancy appeared. The court also awarded petitioner back pay and attorney's fees and expenses but declined to award her prejudgment interest (Pet. App. A20-A33).

A panel of the court of appeals affirmed (Pet. App. A5-A17). The panel noted that prejudgment interest is available in Title VII actions against private employers but that suits against federal instrumentalities, including the Postal Service, are governed by a different provision of Title VII. Compare 42 U.S.C. 2000e(b)(1) (excluding the United States from the statutory definition of "employer") with 42 U.S.C. 2000e-16 (governing employment discrimination suits against federal agencies, explicitly including the Postal Service). The panel agreed with the conclusion, uniformly reached by other courts of appeals, that

prejudgment interest cannot be awarded against the government in a suit under Title VII. Pet. App. A6-A9.

The panel then ruled that Congress did not "intend[] to place postal employees in a better position than all other federal employees with respect to prejudgment interest in Title VII cases" and noted that Congress "consistently has treated postal employees the same as other federal employees for purposes of laws enforcing equal employment opportunity" (Pet. App. A10). The panel accordingly concluded that "[t]here is nothing to suggest that the remedies available to postal employees in Title VII cases should differ from those available to other federal employees in such cases" (*ibid.*).

The panel rejected petitioner's contention that an award of prejudgment interest is authorized by the Postal Reorganization Act, 39 U.S.C. 101 *et seq.*, which permits the Postal Service "to sue and be sued in its official name" (39 U.S.C. 401(1)). After reviewing the legislative history of the Postal Reorganization Act, the panel concluded that "[t]here is * * * no basis upon which to infer that Congress intended the [Reorganization] Act's 'sue and be sued' clause to affect the remedies available to postal employees under the 1972 amendments to Title VII" (Pet. App. A11).

Judge Arnold dissented. He acknowledged that "in enacting the Postal Reorganization Act, Congress did not extend the provisions of Title VII, then inapplicable to federal employees, to postal employees" (Pet. App. A15). But he urged that because the Postal Reorganization Act not only contained a "sue and be sued" clause but gave the Postal Service "a broad range of typical corporate powers" (*id.* at A16), petitioner should be awarded prejudgment interest.

Subsequent to the panel decision, this Court issued its decision in *Franchise Tax Board* v. *United States Postal Service*, No. 83-372 (June 11, 1984), construing the "sue and be sued" clause of the Postal Reorganization Act in a different context. The court of appeals then granted rehearing en banc, received briefing on the significance of *Franchise Tax Board*, and affirmed the judgment of the district court by an equally divided vote (Pet. App. A3-A4).

ARGUMENT

The court of appeals has correctly resolved the relatively narrow issue of statutory construction involved in this case, and its decision does not conflict with that of any other court of appeals; indeed, no other court of appeals has addressed this issue.[1] In addition, there is no opinion of the court of appeals. Further review is therefore not warranted.

1. The question whether prejudgment interest can be awarded against the Postal Service in a Title VII action is, of course, a question of congressional intent. As the panel correctly concluded, at no point did Congress indicate an intent that the Postal Service be subject to such awards.

a. Petitioner asserts that the Postal Reorganization Act—in particular, its "sue and be sued" clause (39 U.S.C. 401(1))—evinces Congress's intent that the Postal Service be subject to awards of prejudgment interest under Title VII. But when the Reorganization Act was passed in 1970, Title VII did

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[1] The same issue is currently before the Eleventh Circuit on the Postal Service's appeal from a district court decision awarding prejudgment interest. *United States Postal Service* v. *Nagy*, No. 84-5583.

not apply to any federal agency, including the Postal Service. See *Brown* v. *GSA*, 425 U.S. 820, 825 (1976). All of the panel members recognized, and petitioner does not dispute, that the Reorganization Act did not make Title VII applicable to the Postal Service. Indeed, as the panel explained (Pet. App. A11), in enacting the Reorganization Act Congress specifically rejected a proposal that the Postal Service be made subject to Title VII. See 116 Cong. Rec. 27597-27598 (1970) (remarks of Representatives Hawkins and Daniels). Thus, in 1970, Congress did not intend to render the Postal Service liable to any remedy under Title VII; it necessarily follows, of course, that Congress did not authorize an award of prejudgment interest under Title VII.

b. In 1972, Congress extended Title VII to federal agencies by adding Section 717, which establishes a mechanism for remedying discrimination "in military departments * * * executive agencies * * * the United States Postal Service and the Postal Rate Commission" as well as in certain other units of government. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 11(a), 86 Stat. 111 (adding 42 U.S.C. 2000e-16(a)). Nothing in the language of this provision suggests that the Postal Service is to be treated differently from any other federal agency, and we are aware of nothing in the legislative history that would support such a conclusion.

Petitioner does not dispute the proposition, accepted by every court of appeals that has considered the issue, that Title VII does not authorize an award of prejudgment interest against government agencies generally. See, *e.g.*, *Saunders* v. *Claytor*, 629 F.2d 596 (9th Cir. 1980), cert. denied, 450 U.S. 980 (1981); *Blake* v. *Califano*, 626 F.2d 891, 894-895

(D.C. Cir. 1980); *deWeever* v. *United States*, 618 F.2d 685 (10th Cir. 1980); *Fischer* v. *Adams*, 572 F.2d 406, 411 (1st Cir. 1978); *Richerson* v. *Jones*, 551 F.2d 918, 925 (3d Cir. 1977). Therefore, as the panel held, there is no basis for viewing the extension of Title VII to the Postal Service as an expression of congressional intent to permit awards of prejudgment interest. The Court has emphasized that Section 717 is "an exclusive, pre-emptive administrative and judicial scheme for the redress of federal employment discrimination." *Brown*, 425 U.S. at 829. Especially because Congress intended Section 717 to be a self-contained remedy, the intentions of the Congress that enacted the Postal Reorganization Act in 1970—a Congress that did not envision the application of Title VII to the Postal Service at all—cannot somehow be used as a basis for construing Section 717, a provision that was enacted two years later.

2. Petitioner relies (Pet. 6-9) on *Franchise Tax Board* v. *United States Postal Service*, *supra*, and *White* v. *Bloomberg*, 501 F.2d 1379, 1385-1386 (4th Cir. 1974). *Franchise Tax Board* concerned the extent to which the "sue and be sued" clause of the Reorganization Act waived the sovereign immunity of the Postal Service in connection with state administrative tax levies. But whatever the scope of that waiver, it is clear, as we have explained, that the Reorganization Act did not authorize any award under Title VII against the Postal Service.

White v. *Bloomberg*, *supra*, also did not involve Title VII but instead concerned an award of prejudgment interest on an obligation that arose prior to the Postal Reorganization Act and was owed by the Post Office Department, the predecessor of the Postal Service. This obligation arose under the Back

Pay Act, 5 U.S.C. 5596, which was applicable to the Post Office Department but is—as the court in *White* explained—not applicable to the Postal Service (see 501 F.2d at 1381 n.2). The Postal Service became liable only because it voluntarily assumed the obligation (see *ibid.*). The question in *White*, therefore, was whether the "sue and be sued" clause makes the Postal Service liable for prejudgment interest on debts it voluntarily assumes under statutes no longer applicable to it. This question is distinct from the issue in this case—whether that clause, enacted in 1970, can somehow expand the Title VII remedy that Congress did not make applicable to the Postal Service until 1972, when Title VII is intended to be an exclusive, self-contained remedy, and when there is no indication that Congress intended the Postal Service to be treated differently for Title VII purposes from other federal instrumentalities that are not subject to awards of prejudgment interest.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

WILLIAM KANTER
CARLENE V. MCINTYRE
Attorneys

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